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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 551 (Sub-No. 2X)

KNOX AND KANE RAILROAD COMPANY—
ABANDONMENT EXEMPTION—MCKEAN COUNTY, PA.

Decided: July 24, 2015

On February 26, 2015, Knox and Kane Railroad Company (Knox & Kane) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments and Discontinuances of Service to abandon a stub-ended line of railroad between Mt. Jewett, Pa. (milepost 165.2) and the Kinzua Bridge (milepost 169.1), a distance of 3.9 miles in McKean County, Pa. (the Line).

In a decision served on April 14, 2015, the Board expressed concern over certain issues raised by Knox & Kane's verified notice of exemption. In particular, the Board noted: (1) Knox & Kane had stated in its environmental report that "[t]he Kovalchick Corporation presently owns the 3.9 mile Knox & Kane right of way, subject to Knox & Kane operating rights";[1] (2) evidence indicated that the Kovalchick Corporation (Kovalchick) purchased the common stock of Knox & Kane in 2008, when Kovalchick also owned the East Broad Top Railroad (East Broad Top);[2] and (3) Knox & Kane had stated, in a 2009 verified notice of exemption seeking to abandon a line of railroad adjacent to the Line at issue in this proceeding, that "[t]he [2009] abandonment encompasses the entire Knox & Kane line. Accordingly, no labor protective conditions are appropriate."[3]

The Board explained that Knox & Kane's filing raised questions regarding: (1) whether Knox & Kane had sufficient rights to the Line to seek abandonment authorization; (2) whether

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[1] Knox & Kane Envtl. Report 2-3.

[2] Knox & Kane sent a letter to the Pennsylvania Historical and Museum Commission on December 23, 2009, which Knox & Kane submitted to the Board as environmental correspondence in connection with its prior abandonment proceeding in Docket No. AB 551 (Sub-No. 1X). The letter is available at http://www.stb.dot.gov/ect1/ecorrespondence.nsf/PublicIncomingByDocketNumber/2C8F00A48FEDC004852576A3006A90D7/$File/EI-18018.pdf. See also E. Broad Top R.R. Pres. Ass'n—Acquis. & Operation Exemption—Kovalchick Salvage Corp., FD 35823 (STB served June 17, 2014).

[3] Knox & Kane Notice, AB 551 (Sub-No. 1X), Oct. 5, 2009, at 5.

Board authority should have been sought for the apparent Knox & Kane transfer of the right-of-way to Kovalchick (under 49 U.S.C. § 10901) and the acquisition of control of Knox & Kane by Kovalchick, at the time the owner of East Broad Top (under 49 U.S.C. § 11323(a)(5)); and (3) whether Knox & Kane accurately certified in its 2009 verified notice of exemption in Docket No. AB 551 (Sub-No. 1X) that the segment for which it sought an abandonment exemption was its "entire line." Therefore, the Board directed Knox & Kane to submit supplemental information addressing these questions and postponed the effectiveness of the exemption until further order of the Board.

Knox & Kane requested an extension of time to file its supplemental information, which the Board granted by decision served on May 5, 2015, and Knox & Kane filed its supplemental information on June 1, 2015. According to Knox & Kane, the statement in its environmental report that "[t]he Kovalchick Corporation presently owns the 3.9 mile Knox & Kane right of way, subject to Knox & Kane operating rights" is inaccurate, and in fact, Knox & Kane owns the right-of-way.[4] Knox & Kane acknowledges Kovalchick's failure to obtain Board authorization for the acquisition of control of Knox & Kane in 2008. Knox & Kane characterizes Kovalchick's omission as inadvertent, based on a misconception that Kovalchick's other railroad, East Broad Top—a segment of which Kovalchick acquired in 1997 through the offer of financial assistance (OFA) procedures under 49 U.S.C. § 10904—was not subject to Board jurisdiction because it conducted only tourist operations and carried no freight.[5]

With respect to its statement that the 2009 abandonment encompassed its entire line, Knox & Kane first indicates that it intended to obtain abandonment authorization for this 3.9-mile segment in 2009, but it failed to include the segment due to confusion over the milepost numbers.[6] On the following page, however, Knox & Kane suggests that it knew the 3.9-mile segment was not included within the milepost range for the 2009 abandonment, but believed it did not need to obtain abandonment authorization for this segment.[7]

As discussed below, the conduct of Kovalchick and its affiliates, such as Knox & Kane, concerns the Board. Nonetheless, given the circumstances here, the Board will permit the notice of exemption to be published. Thus, the abandonment proceeding will be removed from abeyance, and the notice of abandonment exemption will be deemed to have been filed on July 9, 2015.

Although Knox & Kane's explanations for its "entire line" certification in the 2009 abandonment are contradictory, Knox & Kane states that it has no employees, and that its tourist excursion operations ceased in 2002 due to structural deterioration of the Kinzua River Bridge,

[4] Knox & Kane Supplemental Information, J. Kovalchick V.S. 7-8.

[5] Knox & Kane Supplemental Information, J. Kovalchick V.S. 7.

[6] Knox & Kane Supplemental Information, J. Kovalchick V.S. 6-7.

[7] Knox & Kane Supplemental Information, J. Kovalchick V.S. 8-9.

suggesting that it has not had employees for an extended period of time.[8] And in this proceeding, unlike the 2009 abandonment, Knox & Kane truly seeks authority to abandon its entire line. Where the carrier is abandoning its entire line, the Board generally does not impose labor protective conditions under 49 U.S.C. § 10502(g), unless the evidence indicates the existence of: (1) a corporate affiliate that will continue substantially similar rail operations; or (2) a corporate parent that will realize substantial financial benefits over and above relief from the burden of deficit operations by its subsidiary railroad. See, e.g., W. Ky. Ry.—Aban. Exemption—in Webster, Union, Caldwell & Crittenden Cntys., Ky., AB 449 (Sub-No. 3X), slip op. at 2 (STB served Jan. 20, 2011). Because Knox & Kane does not appear to have a corporate affiliate or parent that will continue similar operations or that will realize substantial financial benefits over and above relief from the burden of deficit operations by Knox & Kane, employee protective conditions will not be imposed.

Because Knox & Kane is seeking authorization to abandon its entire line through this proceeding and exit the railroad industry entirely, the Board will not require Kovalchick to now obtain authorization for its 2008 acquisition of control of Knox & Kane. Requiring authorization for the acquisition of control under these circumstances is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101 and is not needed to protect shippers from the abuse of market power. See 49 U.S.C. § 10502(a).

Nonetheless, the Board is concerned that Kovalchick disregarded the requirement that it obtain authorization for its acquisition of control of Knox & Kane (49 U.S.C. § 11323(a)(5)), claiming that it believed East Broad Top was not under the Board's jurisdiction, even though it acquired a segment of East Broad Top through the OFA process. See Consol. Rail Corp.—Aban.—in Huntingdon Cnty., Pa., AB 167 (Sub-No. 1175) (STB served Apr. 10, 1997). If Kovalchick believed that East Broad Top was not within the Board's jurisdiction, this suggests, among other things, a belief that the railroad had no common carrier obligation under 49 U.S.C. § 11101. Also, in its 2009 abandonment filing, Knox & Kane incorrectly certified that it was abandoning its entire line, a statement on which the Board relied in determining not to impose labor protective conditions. Knox & Kane R.R.—Aban. Exemption—in Clarion, Forest, Elk & McKean Cntys., Pa., AB 551 (Sub-No. 1X), slip op. at 2 (STB served Oct. 23, 2009). And in this proceeding, Knox & Kane offers two contradictory explanations for its 2009 "entire line" certification, one of which involves another claim that the company believed a line of railroad was not Board-jurisdictional, even though Knox & Kane sought and obtained a license to construct and operate it as a railroad line subject to the Board's jurisdiction. See Knox & Kane R.R.—Exemption from 49 U.S.C. 10901, FD 31018 (ICC served May 26, 1987). Again, this suggests a mistaken belief that Knox & Kane had no common carrier obligation on the Line and would not have been required to provide service on reasonable request.

[8] See Knox & Kane Supplemental Information, J. Kovalchick V.S. 8. The Board notes, however, that in cases where the "Entire System Abandonment Policy" does not apply—unlike this case—labor protection is mandatory notwithstanding the alleged absence of adversely affected employees. E.g., Chi., Ill.—Adverse Aban.—Chi. Terminal R.R. in Chi., Ill., AB 1036, slip op. at 3-4 (STB served July 10, 2009).

Parties and practitioners alike should be on notice that repeated disregard for statutory and regulatory requirements, as demonstrated by parties in the unauthorized acquisition of control in 2008, the 2009 abandonment, and this proceeding, can lead to increased scrutiny of future filings by those entities or their affiliates.[9] Given the circumstances here, the Board will examine closely any future filings by Kovalchick, Kovalchick Salvage Corporation, or any affiliated companies.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is removed from abeyance.

2. The notice of abandonment exemption is deemed to have been filed on July 9, 2015.

3. This decision is effective on its service date.

By the Board, Joseph H. Dettmar,Acting Director, Office of Proceedings.

[9] See Norfolk S. Ry.—Aban. Exemption—in Norfolk & Va. Beach, Va., AB 290 (Sub-No. 293X), slip op. at 8 (STB served Nov. 6, 2007), pet. for review dismissed sub nom. Riffin v. STB, No. 07-1483 (D.C. Cir. Apr. 22, 2009) (the Board will "closely scrutinize any future filings by Mr. Riffin in this or any other proceeding before the Board"); James Riffin—Acquis. & Operation Exemption—in Rio Grande & Mineral Cntys., Colo., FD 35705, slip op. at 4 (STB served Jan. 11, 2013), pet. for review dismissed sub nom. Strohmeyer v. STB, No. 13-1064 (D.C. Cir. Dec. 30, 2013).